Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

BRUCE MARLIN CHAVEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**On Petition For Writ
To The United States Court
Of Appeals For The Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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No. _____

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PETITION FOR WRIT OF CERTIORARI

CITATIONS TO OPINIONS BELOW

The denial of rehearing by the United States Court of Appeals for the Fifth Circuit in *U.S. v. Chavez*, No. 93-8643 was entered without on May 18, 1994 and this Order is reproduced herein as Appendix Item #I. The unpublished opinion of the United States Court of Appeals for the Fifth Circuit in *U.S. v. Chavez*, No. 93-8643 was entered on July 13, 1994; and is reproduced herein as Appendix Item #II.

JURISDICTION

The denial of rehearing by the United States Court of Appeals for the Fifth Circuit was entered on July 13, 1994. This petitioners timely filed within ninety (90) days of July 13, 1994 pursuant to Supreme Court Rule 20.01. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides pertinent part that:

No person shall be . . . compelled in any criminal case to be a witness against himself.

United States Constitution, Amendment V

STATEMENT OF THE CASE

A. Course and Proceedings in the District Court.

On November 17, 1992, petitioner was named in three counts of a four-count indictment issued out of the El Paso Division of the Western District of Texas that charged him with conspiring from on or about June 20, 1992, and continuing thereafter, up to and including on or about October 28, 1992, with Jose Humberto Garcia, Jorge Bermudez-Casas, and Jesus Gerardo Leon-Enriquez to possess a quantity of cocaine, a Schedule II Controlled Substance, with intent to distribute same, contrary to Title 21, United States Code, Section 841(a)(1), in violation

of Title 21, United States Code, Section 846 (Count One); Count Three charged that on or about July 30, 1992, petitioner, Jose Humberto Garcia, and Jorge Bermudez-Casas possessed with intent to distribute a quantity of cocaine, a Schedule II Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1); and, Count Four charged that on or about October 28, 1992, petitioner, Jose Humberto Garcia, Jorge Bermudez-Casas, and Jesus Gerardo Leon-Enriquez possessed with intent to distribute a quantity of cocaine, a Schedule II Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(12)(1R.13) On July 21, 1993, following a jury trial that began two days earlier, petitioner was found guilty as to Counts One and Four of the indictment, but was acquitted as to Count Three (1R.110) (5R.746-47). On September 15, 1993, the district court sentenced petitioner to a term of one hundred twenty-one months (121) imprisonment and five (5) years of supervised release as to both Count One and Count Four, said sentences to run concurrent with each other (1R.110) (5R.757).

B. Use of the Petitioner's Silence.

During trial the following occurred:

> [PROSECUTOR]: Now, after you were arrested, Mr. Chavez – Well, the story that you've told today, this is the first time you've told the story, is that correct, other than maybe your attorney?
>
> [CHAVEZ]: Yes, sir.

[PROSECUTOR]: All right. You saw [DEA Agent] Martinez the night you were arrested, is that right?

[CHAVEZ]: Yes, sir.

[PROSECUTOR]: Did you recognize him?

[CHAVEZ]: Yeah, I think I did.

[PROSECUTOR]: Did you say anything to him concerning this conversation? Did he talk to you about this conversation?

[CHAVEZ]: Yes, he did.

[PROSECUTOR]: And did you remember the conversation at that time?

[CHAVEZ]: No.

Chavez also objected to the following statement during the prosecutors closing argument:

> Finally, ladies and gentlemen, when you look at everything in this case, consider when he was arrested . . . none of this none of what you heard from the witness stand ever got told to the police that day. None of that explanation, because it didn't happen. You look at the law, you look at the evidence and you look at your common sense. These two guys are guilty. It's your duty to find them guilty.

Chavez thus contends that the prosecutor directly commented on this right to remain silent in violation of *Doyle*.

U.S. v. Chavez, No. 93-8643 Slip Opinion (5th Cir. 1994) at pp. 5-6

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

WHETHER AS A MATTER OF LAW THAT THE USE OF THE PETITIONER'S SILENCE IN TESTIMONY AND IN ARGUMENT TO IMPEACH THE EXCULPATORY VERSION OF THE EVENTS OFFERED BY THE PETITIONER AT TRIAL REQUIRES PLAIN ERROR CONSIDERATION AND REVERSAL.

II.

WHETHER AS A MATTER OF FACT THAT THE USE OF THE PETITIONER'S SILENCE IN TESTIMONY AND IN ARGUMENT TO IMPEACH THE EXCULPATORY VERSION OF THE EVENTS OFFERED BY THE PETITIONER AT TRIAL REQUIRES PLAIN ERROR CONSIDERATION AND REVERSAL.

A. Specific Reasons for Granting the Writ

The case below represents a clear violation of an equally clear constitutional mandate, that the silence of an accused may not be used against him at trial. As we tend to place a greater and greater reliance upon the finality of criminal conviction, it must also reject wholesale violations of long settled restrictions against government overreaching and misconduct at trial. This is especially in cases where much overreaching and misconduct disports the factfinding process by allowing the Government to seek an advantage forbidden by the Constitution which serves to impeach and impugn the sole defense presented by the accused at trial. Any instance of such blatant disregard of settled constitutional restrictions upon government should invite this Court's attention; however, the fact is that violations of restriction set

forth in *Doyle* are now epidemic in number. See: *Fields v. Leapley*, 30 F.3d 986 (C.A.8 1994); *U.S. v. Wiley*, 29 F.3d 345 (C.A.8 1994); *Jackson v. Borg*, 28 F.3d 106 (C.A.9 1994); *U.S. v. Stokes*, 28 F.3d 1215 (C.A.6 1994); *Sauer v. State of Alaska*, 26 F.3d 132 (C.A.9 1994); *Holloway v. Olivarez*, 24 F.3d 246 (C.A.9 1994); *U.S. v. McDowell*, 20 F.3d 83 (C.A.2 1994); *Ayala v. Leonardo*, 20 F.3d 83 (C.A.2 1994); *U.S. v. Matthews*, 20 F.3d 538 (C.A.2 1994); *U.S. v. Pennington*, 20 F.3d 593 (C.A.5 1994); *McMillan v. Gomez*, 19 F.3d 465 (C.A.9 1994); *Libby v. Duval*, 19 F.3d 733 (C.A.1 1994); *U.S. v. Grant*, 17 F.3d 935 (C.A.7 1994); *McNary v. Farley*, 16 F.3d 1225 (C.A.7 1994); *Bolender v. Singletary*, 16 F.3d 1547 (C.A.11 1994); *U.S. v. Kimball*, 15 F.3d 54 (C.A.5 1994); *Green v. Roberts*, 13 F.3d 405 (C.A.10 1993); *Choe v. I.N.S.*, 11 F.3d 925 (C.A.9 1993); *Thomas v. McBride*, 9 F.3d 1549 (C.A.7 1993); *Schneider v. Erickson*, 7 F.3d 760 (C.A.8 1993); *U.S. v. Frogge*, 5 F.3d 541 (C.A.9 1993); *U.S. v. Rivera*, 5 F.3d 543 (C.A.9 1993); *U.S. v. Yi-Hai Lin*, 5 F.3d 544 (C.A.9 1993); *Sadowski v. McCormick*, 2 F.3d 1157 (C.A.9 1993); *U.S. v. Owens*, 2 F.3d 1159 (C.A.9 1993); *U.S. v. Baker*, 999 F.2d 412 (C.A.9 1993); *U.S. v. Carpenter*, 996 F.2d 1213 (C.A.4 1993); *U.S. v. Foster*, 995 F.2d 882 (C.A.9 1993); *McKinney v. Rees*, 993 F.2d 1378 (C.A.9 1993); *U.S. v. Sizemore*, 991 F.2d 797 (C.A.6 1993); *U.S. v. Hoac*, 990 F.2d 1099 (C.A.9 1993); *U.S. v. Bruckner*, 989 F.2d 505 (C.A.8 1993); *U.S. v. Dessens-Fimbres*, 988 F.2d 123 (C.A.9 1993); *U.S. v. Foster*, 985 F.2d 466 (C.A.9 1993); *U.S. v. Canterbury*, 985 F.2d 483 (C.A.10 1993); *U.S. v. Laury*, 985 F.2d 1293 (C.A.5 1993); *Beasley v. Carroll*, 980 F.2d 736 (C.A.9 1992); *U.S. v. Chimal*, 976 F.2d 608 (C.A.10 1992); *Mathenia v. Delo*, 975 F.2d 444 (C.A.8 1992); *U.S. v. Ellis*, 972 F.2d 355 (C.A.8 1992); *U.S. v. Montalvo*, 972 F.2d 1346 (C.A.9 1992);

U.S. v. Wronko, 972 F.2d 1347 (C.A.9 1992); *U.S. v. Driscoll*, 970 F.2d 1472 (C.A.6 1992); *U.S. v. Sands*, 968 F.2d 1058 (C.A.10 1992); *U.S. v. O'Neil*, 968 F.2d 1216 (C.A.6 1992); *Amirault v. Fair*, 968 F.2d 1404 (C.A.1 1992); *U.S. v. Turner*, 966 F.2d 440 (C.A.8 1992); *U.S. v. Negrete-Gonzales*, 966 F.2d 1277 (C.A.9 1992)

The petitioner argues that the wide spread nature of such violations points out a specific need for this Court to hold that reversal is required as a matter of law even under a plain error analysis where (1) the silence of the accused is intentionally brought into evidence by the prosecutor; (2) the prosecutor uses such silence in argument to argue for guilty and to impeach the exculpatory version of the facts presented by the accused at trial; and (3) the exculpatory version of the facts is not patently frivolous, see *Fields Leapley*, 30 F.3d 986 (C.A.8 1994); *U.S. v. Baker*, 999 F.2d 412 (C.A.9 1993).

Such a rule would merely give substance to the view expressed by this Court in *Doyle*, *Chapman*, and in *Greer*. *Greer* pointed out that it was the use of the accused's silence at trial by way specific inquiry, impeachment, and argument which forms the most egregious form of *Doyle* error, *Greer*, 483 U.S. at 764-765. In such circumstances, where a prosecutor representing the United States specifically inquires into the silence of the accused, and uses such silence to impeach the accused and his exculpatory version of the facts in argument, reversal should follow whether or not objection was made below.

B. Arguments and the Merits

This case involves an error of constitutional dimensions where a prosecutor was permitted to elicit testimony regarding the petitioner's post arrest silence and then later argue that such silence was definitive evidence of guilt, *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). In *Chapman v. United States*, 547 F.2d 1240 (5th Cir.), 431 U.S. 908 (1977), this Court categorized *Doyle* violations by degree in regard to the harmless error doctrine. The most serious form of *Doyle* violation found by *Chapman* was that:

> "When the prosecution uses defendant's post-arrest silence to impeach an exculpatory story offered by defendant at trial and the prosecution directly links the implausibility of the exculpatory story to the defendant's ostensibly inconsistent act of remaining silent, reversible error results even, if the story is transparently frivolous. [Citing *United States v. Luna*, 539 F.2d 417 (5th Cir. 1976) (per curiam); *United States v. Harp*, 536 F.2d 601 (1976) (per curiam)].
>
> When the prosecutor does not directly tie the fact of defendant's silence to this exculpatory story, i.e., when the prosecutor elicits that fact on direct examination and refrains from commenting on it or adverting to it again, and the jury is never told that such silence can be used for impeachment purposes, reversible error results in the exculpatory story is not totally implausible or the indicia of guilt not overwhelming. [Citing *United States v. Impson*, 531 F.2d 274 (5th Cir. 1976)]."
>
> *Chapman*, 547 F.2d at 1247-1248

And in our case this is exactly what occurred. The prosecutor cross-examined the Petitioner himself by his silence (R III 549) and then later spent five pages of argument arguing the implausibility of the Petitioner's story, (R III 724-729) ending the argument with the argument that his post-arrest silence showed that this story was a lie, (R III 729). Indeed, a panel of the Fifth Circuit admitted that in this case a full *Doyle* error occurred, thus placing it in the first *Chapman* category.

> "A prosecutor's . . . remarks constitute comment on a defendant's silence, or if the character of the remark was such that the jury would naturally and necessarily so construe the remark." *United States v. Carter*, 953 F.2d 1449, 1464 (5th Cir.), *cert. denied*, 112 S.Ct. 2980 (1992). The manifest intent of the prosecutor's remarks in the instant case, particularly those made during closing argument, was to suggest that Chavez's explanation at trial was a recently fabricated exculpatory story. Hence, those remarks constituted comment on Chavez's silence, and *Doyle* violation occurred. *See id; Laury*, 985 F.2d at 1303.
>
> *U.S. v. Chavez*, No. 93-8643 Slip Opinion (5th Cir. 1994) at p. 7.

Chapman is still the law in the Fifth Circuit having been approved, followed, and utilized by the Fifth Circuit in its lengthy and well reasoned opinion in *Carter*, 953 F.2d 1462, et seq. *Carter* also reaffirmed the authority of a line of cases some cited in *Chapman*, which strongly militate for reversal in situations of full *Doyle* violation even under a plain error analysis. For instance:

In the case before us, the appellant did not object to the evidence of the prosecution witness that appellant remained silent when searched and does not complain of it now. His complaint on this appeal is that the prosecutor committed error in his closing argument when he commented on appellant's silence when searched. This argument of the prosecutor was not objected to by appellant. In view of the decisions in *Hale* and *Impson* that objections of the accused and instructions from the court did not cure the error, we conclude that an objection to the prosecutor's closing remarks in the instant case was not necessary.

* * *

Even if the prosecutor commented on appellant's silence for the purpose of impeaching his credibility as to his subsequent explanations, we hold that the comments were improper and plain error, because appellant's silence lacked significant probative value on his credibility, and under these circumstances any reference to it carried with it an intolerably prejudicial impact. See *Hale, supra,* 422 U.S. 171 at 179, 95 S.Ct. 2133 at 2138, 45 L.Ed. 99 at 107.

United States v. Henderson, 565 F.2d 900, 905-06 (5th Cir. 1978).

The facts of this bizarre case are detailed in our prior opinion. 512 F.2d 786 (5th Cir. 1975). In brief, appellants are inmates at a federal penitentiary who, along with eight other, were discovered in an obvious escape attempt.

* * *

At the consolidated trial for attempted escape (18 U.S.C. § 751(a)), two of those accused

took the stand and presented a *transparently frivolous duress defense,* claiming that only their co-defendant Chapman had intended to escape. Their story was that although the escape cavern had been guilty big enough for ten men, Chapman constructed is alone and his plan had been unexpectedly interrupted when he came upon the other secretly drinking illegally brewed beer under the boxcar in the loading dock pit. Rather than jeopardize his scheme, Chapman kidnapped the other nine and forced his "victims" into the hideaway by threatening them with fake guns. Chapman also took the stand and corroborated the kidnapping explanation; this defense was that he was insane at the time. Neither Breaux nor Harp elected to testify; instead, their co-defendant's story as their defense.

[1] To rebut this collective defense, the prosecutor highlighted in closing argument the fact that from the moment of their "deliverance" to the time of trial, no defendant had ever told prison officials or investigating officers that he was a "victim" rather than a perpetrator of the offense. No objection to these remarks was register by any of the defendant's. *However, under a plain error review these comments necessitate reversal.*

* * *

Because the prosecutor's comment struck at the jugular of their story, those remarks cannot be classified as harmless.

United States v. Harp, 536 F.2d 601, 602-03 (5th Cir. 1976).

> We must therefore reverse. In so doing we note that the comment upon silence of the accused with a crooked knife and one likely to turn in the prosecutor's hand. The circumstances under which it will not occasion a reversal are few and discrete. We suggest that it be abandoned as a prosecutorial technique.
>
> *United States v. Edwards*, 576 F.2d 1152, 1155 (5th Cir. 1978).

See *Carter*, 953 F.2d at 1466.

Under its facts, Carter evaluated its *Doyle* error as being in the second *Chapman* category because it dealt with a peripheral issue which did not directly relate the exculpatory story told by the Defendant in *Carter*, see *Carter*, 953 F.2d at 1462. Because of this and because of a curative instruction, the *Carter* court did not reverse. However, as reaffirmed by *Carter, Chapman, Edwards, Henderson,* and *Harp* are still the law.

In our case, the panel purported to follow *Carter*, but actually followed *U.S. v. Laury*, 985 F.2d 1293 (5th Cir. 1993).

> Despite any improper prosecutorial comments on Laury's immediate post-arrest silence, the record contained sufficient evidence of Laury's guilt. See discussion supra part III A. Therefore, the prosecutor's error was not substantial or so prejudicial that Laury's trial lacked the fundamental elements of justice. The prosecutor's comments did not constitute plain error.
>
> *U.S. v. Laury*, 985 F.2d 1293, 1304 (5th Cir. 1993).

As the panel in this case evaluated our facts it simply reiterated the Government's case, ignored the defense and exculpatory story presented at trial, and cited the foregoing portion of the *Laury* decision.

> The evidence at trial showed that Chavez's house was used as a "stash" house. In July 1992, Juan, DEA agent Martinez, and Bermudez-Casas went to Chavez's house to pick up a suitcase with 24 kilograms of cocaine. The suitcase had a luggage tag with Chavez's name and address. In October 1992, Haught and Bermudez-Casas went to Chavez's house to load cocaine, which they had picked up from Leon-Enriquez, in a secret compartment in the Volkswagen being used to transport the cocaine. Because Haught and Bermudez-Casas had difficulty with the secret compartment, Chavez purchased cement to glue the carpet down over the secret compartment. Chavez then permitted them to store cocaine in his garage after they were unsuccessful in concealing it in the secret compartment. During the consensual search of Chavez's house DEA agents seized 28 kilograms of cocaine.
>
> Considering the evidence introduced at trial, we conclude that the prosecutor's error was not so substantial or prejudicial that Chavez's trial lacked the fundamental elements of justice. *See Laury*, 985 F.2d at 1304. Hence, the prosecutor's comments did not constitute plain error.
>
> *U.S. v. Chavez*, No. 93-8643 Slip Opinion (5th Cir. 1994) at p. 7-8.

The fact is that the Petitioner presented a seven witness defense where the Petitioner's story was supported by

his own testimony (R III 453) and that of another witness (R III 584). This approach is directly contrary to the holdings of the United States Supreme Court in *Chapman v. California*, 87 S.Ct. 824 (1967) and this Court's decisions in *Chapman, et al.* The panel seemed to think that a "miscarriage of justice" meant that an innocent man was convicted and that "sufficient evidence," *Laury* 985 F.2d at 1304, eliminated this problem. This is not what the U.S. Supreme Court decision in Chapman teaches. That Court clearly pointed out:

> The Federal rule emphasizes "substantial rights" as do most others. The California constitutional rule emphasizes "a miscarriage of justice," but the California courts have neutralized this to some extent by emphasis, and perhaps overemphasis, upon the court's view of "overwhelming evidence."
>
> * * *
>
> 7. The California Supreme Court in this case did not find a "miscarriage of justice" as to petitioner Teale, because it found from "other substantial evidence, [that] the proof of his guilt must be deemed overwhelming" 63 Cal.2d, at 197, 45 Cal.Rptr., at 740, 404 P.2d at 220.
>
> *Chapman v. State of California*, 87 S.Ct. 824, 827 (1967).

And also pointed out:

> We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.

> An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under *Fahy*, be conceived of as harmless.
>
> *Chapman v. State of California*, 87 S.Ct. 824, 827-28 (1967).

This approach is clearly in line with this Court's approach in *Chapman v. United States* which was recently followed and quoted in *Carter*.

> "When the prosecution uses defendant's post-arrest silence to impeach an exculpatory story offered by defendant at trial and the prosecution directly links the implausibility of the exculpatory story to the defendant's ostensibly inconsistent act of remaining silent, reversible error results even if the story is transparently frivolous. [Citing *United States v. Luna*, 539 F.2d 417 (5th Cir. 1976) (per curiam); *United States v. Harp*, 536 F.2d 601 (1976) (per curiam)].

And this approach is consistent with the other cases in this Circuit which evaluate a plain error under *Doyle* see:

> As we have already stated, we must now determine whether the *Doyle* violation is harmless error. *Shaw*, 701 F.2d at 382. We believe that the prosecutor's comments in his opening statement and closing argument constitute harmless error. This case does not seem to fall squarely into any of the categories of cases discussed in *Chapman*. None of the statements which violate *Doyle* came out in the course of the testimony of witnesses but instead occurred only in the opening statement and closing argument. The defense attorney explicitly told the jury in his opening statement that comments by the attorneys were

not to be considered evidence by them in deciding the defendants' guilt or innocence. Furthermore, in its charge to the jury, the district court reiterated *the fact that statements by attorneys are not evidence in the case. We also find it significant that the comments by the prosecutor did not rebut Cardenas' defense of noninvolvement but instead rebutted his codefendants' coercion story.*

The government also presented strong evidence of Cardenas' guilt. For example, Cardenas had white powder from the packages of marijuana on his clothes. In addition, the evidence showed that a close connection existed between Cardenas and the other codefendants. Finally, Cardenas was crossing the border at an unusual time if he was a field worker as he asserted; he also fled when he was spotted by the Border Patrol agents. Under these circumstances, we believe that *Doyle* violations in this case constitute harmless error and a *fortiori* are not plain error.

United States v. Cardenas Alvarado, 806 F.2d 566, (5th Cir. 1986).

And:

No aspect of the plain error standard is met here, and there is clearly nothing to suggest a likely miscarriage of justice. The referenced possible *Doyle* violations did not loom large at trial. The prosecution's evidence of guilt was well more than sufficient, and there was essentially no contrary evidence. According, Martinez's *Doyle* contentions present no reversible error.

United States v. Mercado, 888 F.2d 1484, 1484 (5th Cir. 1989).

In these two cases, the Court found that the *Cardenas* case involved a peripheral point and thus fell under the second *Chapman* category where level of evidence plays a strong role; and the Court found in *Mercado* that the lack of contrary evidence (exculpatory story) also relegated that case to the second *Chapman* category.

The Appellant would argue that in evaluating a full blown *Doyle* error even on a harmless error analysis, the use of sufficiency of evidence to find no reversible error is completely out of place. If the evidence was insufficient this Court would be reversing and rendering, not reversing and remanding for a *Doyle* error. Likewise, the U.S. Supreme Court in *Chapman* made it clear that the use of a defendant's silence implicates his substantial rights that the miscarriage of justice occurs when the prosecution uses this violation to destroy a defendant's exculpatory story at trial, *Chapman v. California, supra, Chapman v. United States, supra.* Because the Opinion in this case (and in *Laury*) contradicts long standing authority in this Circuit, the Petitioner feels that a rehearing *en banc* is justified.

CONCLUSION AND PRAYER

WHEREFORE THE ABOVE PREMISES CONSIDERED, the Petitioner prays that this Court grant a writ of certiorari to the United States Court of Appeals for the Fifth Circuit; thereafter remand this cause to the United

States Court of Appeals for the Fifth Circuit with instructions to reverse his conviction.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8643

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BRUCE MARLIN CHAVEZ, and
JESUS GEARDO LEON-ENRIQUEZ,

Defendants-Appellants.

Appeals from the United States District Court
for the Western District of Texas
(EP-92-CR-416-4)

(Filed May 18, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Co-defendants Bruce Marlin Chavez and Jesus Geardo Leon-Enriquez each appeals his judgment of conviction and sentence rendered by the district court. Finding no error, we affirm.

I.

A. Factual Background

In November 1991, Juan Cardenas (Juan) contacted the Drug Enforcement Agency (DEA) in El Paso, Texas, agreeing to become a confidential informant. As a result, the DEA began an investigation of his half-brother, Ramon Abel Cardenas-Hernandez (Ramon), and others with whom Juan had been admittedly involved in drug trafficking. As part of their investigation, DEA agents rented a warehouse in El Paso to use to store cocaine received from Ramon.

In June 1992, Juan notified DEA agents that Ramon, Jorge Bermudez-Casas (Bermudez-Casas), and Jose Garcia (Garcia) were preparing to transport cocaine from El Paso to California. On June 23, 1992, Bermudez-Casas and Garcia transported 200 kilograms of cocaine to the El Paso warehouse, where Juan assisted then [sic] in secreting the cocaine in barrels of oil. After Bermudez-Casas and Garcia left, Juan contacted Ramon and told him that the cocaine shipment was ready to go. The next day, Juan, a DEA agent, and a cooperating truck driver loaded the barrels onto a tractor-trailer and transported them to California, where they were delivered to Ramon.

On July 29, 1992, Juan notified DEA agents that Ramon and Bermudez-Casas were preparing to receive 250 kilograms of cocaine from Garcia and to transport it

to California. The next day, DEA Agent Sal Martinez, working undercover, picked up Juan and Bermudez-Casas in a van, and all three men proceeded to a "stash" house in El Paso that belonged to Garcia. They drove into the garage and loaded approximately 192 bundles of cocaine into the van. They then drove to the warehouse where they unloaded the cocaine and secreted it in barrels of oil. Later that day, the three men picked up more cocaine from Garcia's house and from the residence of Bruce Marlin Chavez (Chavez), another "stash" house, before taking it to the warehouse and also secreting it in barrels of oil.

In September 1992, Dennis Haught (Haught), Garcia's brother-in-law who was responsible for coordinating the "stash" houses, followed Jesus Geardo Leon-Enriquez (Leon-Enriquez) and another man to Leon-Enriquez's house, where Haught received a box containing cocaine from Leon-Enriquez. On October 28, 1992, Haught and Bermudez-Casas returned to Leon-Enriquez's house where they picked up two more boxes containing cocaine from Leon-Enriquez. They then took these two boxes to Chavez's house and attempted to conceal them in a secret compartment in the Volkswagen they were driving. When they had difficulty with the secret compartment, Chavez left to purchase cement to glue the carpeting over the secret compartment. After the cement proved of no use, they left the boxes in Chavez's garage with Chavez's permission. Later that day DEA agents searched Chavez's house and seized the cocaine. They also searched Leon-Enriquez's house and seized large sums of money, a small quantity of cocaine, and other drug paraphernalia.

B. Procedural History

On November 17, 1992, a grand jury returned an indictment against Chavez and Leon-Enriquez, along with others who are not parties to this appeal, for federal drug violations. A four-count superseding indictment issued on December 15, 1992, specifically charging Chavez and Leon-Enriquez with conspiracy to possess with the intent to distribute cocaine, in violation of 21 U.S.C. §§ 846 and 841(a)(1) (Count I), and with possession with intent to distribute cocaine on October 28, 1992, in violation of 21 U.S.C. § 841(a)(1) (Count IV). In addition, Chavez was charged with possession with the intent to distribute cocaine on July 30, 1992, in violation of 21 U.S.C. § 841(a)(1) (Count III).

Trial was held in the United States District Court for the Western District of Texas, and a jury convicted Chavez on Counts I and IV, and Leon-Enriquez on Count IV. The court then sentenced Chavez to 121 months imprisonment on each count to run concurrently, a five-year term of supervised release on each count to run concurrently, and a special assessment of $100. The court also sentenced Leon-Enriquez to 121 months imprisonment, a five-year term of supervised release, and a special assessment of $50. Chavez and Leon-Enriquez now appeal.

II.

Chavez contends that the remarks made by the prosecutor during cross-examination and closing argument

constitute a violation of his right to a fair trial under *Doyle v. Ohio*, 426 U.S. 610 (1976). We disagree.

During the trial, Chavez testified on his own behalf. He testified that undercover DEA agent Martinez had come to his door with a suitcase, saying "I got you a suitcase. I picked it up. It was full of cocaine." He also testified that he had thought that Martinez was merely bringing him this suitcase, which belonged to a friend of Garcia and which he had asked Garcia to borrow for a trip he was taking, on Garcia's instructions. When questioned about the ensuing conversation between him and Martinez concerning cocaine, he testified that he had "gone along" and participated in the conversation "to play detective" because he had suspected Garcia of drug dealing for some time.

At the time of his arrest, Chavez did not relate to the arresting officers what he testified to at trial. Instead, Chavez only commented by asking why he was being arrested and denying any knowledge of narcotics trafficking.

Chavez now objects to the following discussion during cross-examination:

> PROSECUTOR: Now, after you were arrested, Mr. Chavez – Well, the story that you've told today, this is the first time you've told the story, is that correct, other than maybe your attorney?
>
> CHAVEZ: Yes, sir.
>
> PROSECUTOR: All right. You saw [DEA agent] Martinez the night you were arrested, is that right?
>
> CHAVEZ: Yes, sir.

PROSECUTOR: Did you recognize him?

CHAVEZ: Yeah, I think I did.

PROSECUTOR: Did you say anything to him concerning this conversation? Did he talk to you about this conversation?

CHAVEZ: Yes, he did.

PROSECUTOR: And did you remember the conversation at that time?

CHAVEZ: He told me something about –

THE COURT: His question was, did you remember the conversation at that time?

CHAVEZ: No.

Chavez also objects to the following statement during the prosecutor's closing argument:

> Finally, ladies and gentlemen, when you look at everything in this case, consider when he was arrested, . . . none of this, none of what you heard from the witness stand ever got told to the police that day. None of that explanation, because it didn't happen. You look at the law, you look at the evidence and you look at your common sense. These two guys are guilty. It's your duty to find them guilty.

Chavez thus contends that the prosecutor directly commented on his right to remain silent in violation of *Doyle*.

In *Doyle*, the Supreme Court held that the Due Process Clause prohibits impeachment of a defendant's

exculpatory story at trial by using the defendant's immediate post-arrest, post-*Miranda*[1] warnings silence. *Doyle*, 426 U.S. at 619. Comments such as Chavez's, i.e., that he had no knowledge of drug trafficking, have been treated as being tantamount to "silence." *See United States v. Laury*, 985 F.2d 1293, 1302 n.7 (5th Cir. 1993). Although virtually any remarks by a prosecutor concerning such "silence" will constitute a *Doyle* violation, those remarks must be evaluated in context. "A prosecutor's . . . remarks constitute comment on a defendant's silence if the manifest intent was to comment on the defendant's silence, or if the character of the remark was such that the jury would naturally and necessarily so construe the remark." *United States v. Carter*, 953 F.2d 1449, 1464 (5th Cir.), *cert. denied*, 112 S. Ct. 2980 (1992). The manifest intent of the prosecutor's remarks in the instant case, particularly those made during closing argument, was to suggest that Chavez's explanation at trial was a recently fabricated exculpatory story. Hence, those remarks constituted comment on Chavez's silence, and a *Doyle* violation occurred. *See id.*; *Laury*, 985 F.2d at 1303.

We normally review a *Doyle* violation for harmless error. *Laury*, 985 F.2d at 1304. Because Chavez failed to object at trial to the prosecutor's remarks, however, we review the *Doyle* violation for plain error. *Id.* at 1304. "Plain error is error so great that it cannot be cured at trial; the error must be obvious, substantial, and so basic and prejudicial that the resulting trial lacks the fundamental elements of justice." *Id.* (internal quotations and

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1986).

citations omitted). This court will reverse only to prevent a grave miscarriage of justice. *Id.*

The evidence at trial showed that Chavez's house was used as a "stash" house. In July 1992, Juan, DEA agent Martinez, and Bermudez-Casas went to Chavez's house to pick up a suitcase with 24 kilograms of cocaine. The suitcase had a luggage tag with Chavez's name and address. In October 1992, Haught and Bermudez-Casas went to Chavez's house to load cocaine, which they had picked up from Leon-Enriquez, in a secret compartment in the Volkswagen being used to transport the cocaine. Because Haught and Bermudez-Casas had difficulty with the secret compartment, Chavez purchased cement to glue the carpet down over the secret compartment. Chavez then permitted them to store cocaine in his garage after they were unsuccessful in concealing it in the secret compartment. During the consensual search of Chavez's house, DEA agents seized 28 kilograms of cocaine.

Considering the evidence introduced at trial, we conclude that the prosecutor's error was not so substantial or prejudicial that Chavez's trial lacked the fundamental elements of justice. *See Laury*, 985 F.2d at 1304. Hence, the prosecutor's comments did not constitute plain error.

III.

Leon-Enriquez argues that the trial court erred in finding that there was sufficient evidence to support his conviction and thus in denying his motion for judgment of acquittal. We disagree.

This court reviews the district court's denial of a motion for judgment of acquittal *de novo*. *United States v. Restrepo*, 994 F.2d 173, 182 (5th Cir. 1993). On a sufficiency of the evidence challenge, we consider the evidence in the light most favorable to the government, including all reasonable inferences that can be drawn from the evidence. *United States v. Pigrum*, 922 F.2d 249, 253 (5th Cir.), *cert. denied*, 111 S. Ct. 2064 (1991). The test is not whether the evidence excludes every reasonable hypothesis of innocence or is wholly inconsistent with every conclusion except that of guilt, but whether a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt. *Id.* The jury is the final arbiter of the weight of the evidence and the credibility of the witnesses. *Restrepo*, 994 F.2d at 182.

Leon-Enriquez argues that the evidence does not support his "knowing" possession of cocaine. He specifically contends that the government failed to prove his "knowledge" of the contraband contained in boxes he handled or carried.

To establish an offense under 21 U.S.C. § 841(a)(1), the government must prove that the defendant had knowing possession of the illicit substance with intent to distribute. *United States v. Cardenas*, 9 F.3d 1139, 1158 (5th Cir. 1993); *United States v. Munoz*, 957 F.2d 171, 174 (5th Cir.), *cert. denied*, 113 S. Ct. 332 (1992). The elements of the offense may be proven by circumstantial evidence alone. *Cardenas*, 9 F.3d at 1158. Possession may be actual or constructive and may be joint among several defendants. *Id.* This court has defined "constructive possession" as " 'the knowing exercise of, or the knowing power or right to exercise dominion and control over the proscribed

substance.' " *Id.* (quoting *United States v. Molinar-Apodaca*, 889 F.2d 1417, 1423 (5th Cir. 1989)).

The evidence at trial established that during a valid search of Leon-Enriquez's house, DEA agents seized from the master bedroom a black briefcase containing $2,100 and a vial of cocaine, a shoebox containing $11,670 and a small digital scale, a set of triple-beam scales, and a bottle of Inositol – a non-controlled substance that can be used to dilute cocaine. The agents also seized a Tenecia Model 1479 scale with trace amounts of a white powdery substance from a hall bathroom and an Accuweigh scale from the garage. The agents also found a small notebook with names and prices such as $45 and $60 listed next to the names. The notebook was not seized, however, because the warrant did not permit the agents to seize "documents." One of the DEA agents testified at trial that the items found in Leon-Enriquez's house were consistent with someone in the household selling cocaine or other controlled substances at the street level.

Haught testified that in September 1992 when he complained to Garcia that he was not being paid for his role in the organization, he was told to meet with a man at a Taco Cabana on the east side of El Paso. Once there, two men – one of whom was Leon-Enriquez – got his attention, and he followed them to Leon-Enriquez's residence. Leon-Enriquez and the other man then got out of the car and went into the garage, returning with a box that contained 16 kilograms of cocaine which they gave to Haught. Haught also testified that on October 28, 1992, he and Bermudez-Casas returned to Leon-Enriquez's house and that Leon-Enriquez gave them two boxes of cocaine.

From this evidence, viewed in the light most favorable to the jury verdict, the jury could have reasonably concluded that Leon-Enriquez knowingly possessed cocaine with intent to distribute. The district court thus did not err in denying Leon-Enriquez's motion for judgment of acquittal.

IV.

For the foregoing reasons, we AFFIRM the district court's judgment of conviction and sentence as to each Chavez and Leon-Rodriguez [sic].

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8643

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BRUCE MARLIN CHAVEZ,
and JESUS GEARDO LEON-ENRIQUEZ,

Defendants-Appellants.

Appeals from the United States District Court
for the Western District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 5-18-94, 5 Cir., ___, ___ F.3d)

(Filed July 13, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:

[X] Treating appellant Bruce Marlin Chavez suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

[ ] Treating appellant Bruce Marlin Chavez suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Carolyn Denieu King
United States Circuit Judge
REHG-8

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR
STAY OF THE MANDATE